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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALBERTO BARRON, Defendant and Appellant.	A155001 (San Mateo County Super. Ct. No. SC060485A)

In 2007, Jesus Alberto Barron pled no contest to two felonies and the trial court sentenced him to 16 years in state prison. In 2018, the court recalled Barron's sentence pursuant to Penal Code section 1170, subdivision (d),[1] based on a change in the law occurring after the original sentencing. At the time of the July 2018 resentencing hearing, Barron was incarcerated in an out-of-state prison. He was absent from the resentencing hearing even though defense counsel requested his attendance.

We conclude Barron's absence from resentencing constitutes federal constitutional error and that the People have not demonstrated that error was harmless beyond a reasonable doubt. We order the trial court to conduct a new resentencing hearing at which Barron must be present unless he waives the right pursuant to section 1193.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2007, the prosecution charged Barron with robbery with force (§§ 664/212.5, subd. (c) (count 1)); dissuading a witness (§ 136.1, subd. (b)(1) (count 2));

[1] Undesignated statutory references are to the Penal Code.

assault (§ 245, subd. (a)(2) (count 3)); participation in a gang (§ 186.22, subd. (a) (count 4)); attempted murder (§§ 664/187, subd. (a) (count 5)); assault with a firearm (§ 245, subd. (b) (count 6)); negligent discharge of a firearm (§ 246.3 (count 7)); running a red light during a police chase (Veh. Code § 2800.2 (count 8)); and misdemeanor resisting arrest (§ 148, subd. (a)(1) (count 9)).

That same day, Barron pled no contest to gang participation (count 4) and assault with a firearm (count 6). As part of the plea agreement, Barron admitted counts 4 and 6 were serious felonies (§ 1192.7, subd. (c)), and that count 6 involved the use of a firearm (§ 12022.5, subd. (a)) and was committed in furtherance of a street gang (§ 186.22, subd. (b)(1)). Barron also agreed his maximum sentence would be 16 years. The probation report recommended committing Barron to state prison.

In August 2007, the court sentenced Barron to 16 years in state prison, comprised of the low term of three years for assault with a firearm (count 6), and a 10-year gang enhancement (§ 186.22, subd. (b)(1)) and a three-year firearm use enhancement (§ 12022.5, subd. (a)) on that conviction. The court also imposed a two-year midterm concurrent sentence on the gang participation conviction (count 4).[2]

In March 2018, the California Department of Corrections and Rehabilitation (CDCR) recommended recall and resentencing (§ 1170, subd. (d)) based on *People v. Rodriguez* (2009) 47 Cal.4th 501, which held a court may not impose a gang participation enhancement and a firearm use enhancement if both are based on the use of a firearm. In May 2018, the parties submitted resentencing briefs. The prosecution claimed Barron did "not have a right to be present at . . . resentencing" and urged the court to resentence Barron "to the same 16 year sentence by selecting alternative terms." Barron argued he "should be present for resentencing." He urged the court to sentence him "to the original

[2] We augmented the record with Barron's June 2007 change of plea form and the August 2007 probation report and sentencing minute order. (Cal. Rules of Court, rule 8.340(c).) The reporter's transcripts of the change of plea hearing and original sentencing do not exist.

terms but only apply the [gang participation] enhancement," resulting in a 13-year sentence.

At the July 20, 2018 resentencing hearing, defense counsel noted Barron was "in state prison . . . housed in Arizona. He is not here today." The court indicated it had read the parties' sentencing briefs. Then it stated: "This is a re-sentencing based on a change in the law following the original sentencing. And the court was requested to look at the matter once again in light of the change in the law post sentencing. And I have." The court said it originally sentenced Barron to "16 years in prison. And the court originally gave a low term on the [section] 245(b) . . . in light of the fact that a ten-year enhancement and an additional three-year enhancement was being imposed. [¶] In light of the fact based on the law that changed subsequently, a new case decision, and the fact that going forward the court should not impose an additional three-year enhancement on the [section] 12022.5(a) . . . , the court will instead impose the mid-term on the [section] 245(b), which is six years, and impose the ten-year enhancement under [section] 186.22(b)(1). [¶] . . . [¶] And the total sentence . . . will be 16 years just as it was originally."

The parties did not offer evidence or argument. When the court asked whether there was "anything further," Barron's attorney objected "to reserve any appeals that [Barron] may make." Then the prosecutor asked, "as far as [a] statement of reasons goes, for purposes of the record, I'm presuming the court is also basing . . . the selection on those terms upon the facts and factors presented in the probation report?" The court responded: "As I laid them out originally at sentencing. The only thing I'm changing here is the composition of the 16 years. The 16 years remains." The abstract of judgment includes a two-year concurrent sentence for the gang participation conviction on count 4.

DISCUSSION

A defendant has a constitutional and statutory "right to be present at critical stages of a criminal prosecution," including " 'sentencing and pronouncement of judgment.' " (*People v. Wilen* (2008) 165 Cal.App.4th 270, 286, 287; see also § 977, subd. (b)(1).)

This right extends to resentencing hearings. (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1414, 1417; *People v. Simms* (2018) 23 Cal.App.5th 987, 996 (*Simms*).) A defendant may waive his personal presence "in open court and on the record, or in a notarized writing." (§ 1193, subd. (a).) Here, Barron did not waive his presence, and the People concede the court erred by conducting the resentencing hearing in Barron's absence.

Because the right to be present at a resentencing proceeding "is of federal constitutional dimension, its violation may be deemed harmless only if we can conclude beyond a reasonable doubt that the deprivation did not affect the outcome of the proceeding." (*Simms, supra*, 23 Cal.App.5th at p. 998; *People v. Mendoza* (2016) 62 Cal.4th 856, 902.) The People argue the error was harmless beyond a reasonable doubt because Barron's presence "would not have led to a more favorable sentence." The People contend the 16-year sentence was "appropriate" and fault Barron for failing to "identify the substance of any testimony he might have presented had he been present at the hearing." In suggesting it was Barron's obligation to demonstrate a lack of prejudice, the People misunderstand their burden on appeal. When a defendant is absent from a resentencing hearing, we must "reverse . . . unless the People can demonstrate that the error was harmless beyond a reasonable doubt." (*People v. Reese* (2017) 2 Cal.5th 660, 671.)

The People have not satisfied their burden. Barron's plea bargain contemplated a maximum sentence of 16 years. When a sentence is recalled pursuant to section 1170, subdivision (d), "the resentencing court has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall. [Citations.] [T]he resentencing court may consider 'any pertinent circumstances which have arisen since the prior sentence was imposed.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) Section 1170, subdivision (d)(1) authorizes a court conducting resentencing to "reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of

rehabilitation . . . and evidence that reflects that circumstances have changed since the inmate's original sentencing."

Our reading of the five-page reporter's transcript suggests the court viewed the resentencing hearing as a perfunctory matter of minimally modifying the sentence to comply with *People v. Rodriguez*. When the prosecutor urged the court to identify the basis for the sentence, the court responded: "As I laid them out originally at sentencing. The only thing I'm changing here is the composition of the 16 years. The 16 years remains." The reporter's transcript of the original sentencing does not exist, but the minute order indicates the court imposed the low term on the assault with a firearm conviction (count 6). At the resentencing hearing, the court "did not consider other factors [Barron] and his counsel may have been able to bring to its attention" to justify imposition of the low term on count 6. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 360 [defendant "was not given the opportunity 'to emphasize mitigating evidence that weighed in favor of leniency' "]; see also § 1170, subd. (d)(1).)

Barron "may well have had something to say" at the resentencing hearing. (*Simms, supra,* 23 Cal.App.5th at p. 998.) He may have made a plea for leniency; he may have expressed remorse; he may have offered mitigating factors arising after his original sentencing. (See § 1170, subd. (d)(1).) "The trial court may, or may not, have chosen to believe what [Barron] might have said, if he said anything, but we cannot conclude beyond a reasonable doubt that his presence at the [resentencing] hearing would not have affected the outcome." (*Simms,* at p. 998.) "[R]emand is necessary to ensure proceedings that are just under the circumstances, namely, a hearing at which both the People and [Barron] may be present and advocate for their positions." (*People v. Rocha, supra,* 32 Cal.App.5th at p. 360.)

The People's reliance on *In re Guiomar* (2016) 5 Cal.App.5th 265 (*Guiomar*) does not alter our conclusion. In that case, the defendant argued the result of a resentencing hearing "would have been different if he had been present because he could have given 'input' on his rehabilitation." (*Guiomar,* at p. 279.) The Sixth District Court of Appeal disagreed, noting the defendant had "not shown that he has been making efforts at

rehabilitation, nor has he provided authority for his claim that rehabilitation is relevant once the trial court has made the decision to resentence." (*Ibid.*)

Guiomar has limited relevance here because it was decided before the Legislature amended section 1170. When *Guiomar* was decided, section 1170, subdivision (d) required the court to "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." (former § 1170, subd. (d)(1).) As noted above, section 1170, subdivision (d)(1) now authorizes a court conducting resentencing pursuant to that statute to "consider postconviction factors," including "evidence that reflects that circumstances have changed since the inmate's original sentencing." In light of the amendment to section 1170, subdivision (d), *Guiomar's* reasoning is not persuasive.

Nor is this case—as the People suggest—like *People v. Davis* (2005) 36 Cal.4th 510. There, the defendant was absent from a pretrial hearing concerning the admissibility of a jailhouse recording and transcript. (*Id.* at pp. 532–533.) The California Supreme Court held the defendant was not prejudiced by his absence because his attorneys had access to the recording and transcript before the hearing, and thus, "ample opportunity to discuss the contents with defendant and to seek his assistance in deciphering the recorded conversation. Assuming they did so, defendant's presence at the hearing would have added little to his attorneys' ability to argue the admissibility of the excerpts. Further, the trial court's rulings at the . . . hearing were without prejudice to later arguments that the transcript was inaccurate or that certain portions were not admissible. Thus, it appears that defendant's counsel could have consulted with him after the hearing, and could have brought to the court's attention at a later time any possible contributions or corrections that defendant might have made." (*Id.* at p. 533.) In our view, *Davis* is distinguishable. This was not a pretrial admissibility hearing where the court's rulings were subject to change—it was a resentencing hearing where the court's decision was final. And unlike *Davis*, there is no indication defense counsel had an opportunity to consult with Barron

before the resentencing hearing, nor any suggestion Barron's comments at the hearing, if any, would have been unhelpful.

For the reasons discussed above, the People have not established the federal constitutional error was harmless beyond a reasonable doubt.[3] The trial court must conduct a new resentencing hearing at which Barron must be present, unless his waiver complies with section 1193.

DISPOSITION

The July 20, 2018 order is vacated and the matter is remanded. The trial court must conduct a new resentencing hearing at which Barron must be present, unless his waiver complies with section 1193.

[3] Having reached this result, we need not address Barron's contention that the court failed to consider the appropriate factors when imposing the middle term on count 6, and we express no opinion on the propriety of the middle term for that conviction, nor on the concurrent sentence on the gang participation conviction (count 4).

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Burns, J.

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